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The deal between the United States and the Soviet Union, under which both Nicholas Daniloff and Gennadi Zakharov have been freed from prison — at least for now — raises some intriguing and ironic legal questions that have not been explored by the press.

The starting point of any rational discussion is, of course, that Americans who live in Moscow are subject to Soviet law and Russians who live in New York are subject to American law, and that the domestic laws of our two countries are radically different.

In general, the American approach is that anything not specifically forbidden by statute is permitted.

The Soviet approach, on the other hand, is that anything not specifically permitted is forbidden.

We operate under a presumption of freedom, while they live under a presumption of regulation.

As it applies here, American law generally permits the gathering of information that the government would prefer to keep confidential, while Soviet law prohibits such collecting. American law generally frowns on "entrapment," while Soviet law encourages the tempting of people into criminality. American law insists on a presumption of innocence and generally favors pre-trial release of arrested suspects, while Soviet law presumes the defendant guilty and demands his imprisonment pending trial.

Mr. Daniloff, an American citizen accustomed to the presumption of freedom, is now subject to the Soviet presumption of regulation. Mr. Zakharov, a Soviet citizen accustomed to regulation, is now entitled to many of the freedoms guaranteed by the U.S. Constitution.

It seems clear to me that Mr. Daniloff was almost certainly set up

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Zakharov enjoys an advantage

by the KGB, that he is not a spy for the U.S. government, and that he was arrested in retaliation for our arrest of Mr. Zakharov. But under Soviet law, that does not necessarily mean that Mr. Daniloff is completely innocent and not subject to detention, investigation, and trial. The Soviet law on spying includes collection of information for purposes of transfer to "a foreign organization" or for "use to the detriment of the interests of the U.S.S.R."

Any innovative and probing reporter may well run afoul of this outrageously broad — and, under American principles, unconstitutionally restrictive — language of the Soviet law, even if he has no malevolent intention beyond gathering information for a good story.

If Mr. Daniloff's actions were even arguably illegal under Soviet law, then the KGB is legally entitled to imprison him without a lawyer for nine months. This may sound incomprehensible to most Americans, but it is business as usual in the Soviet Union — at least for its own citizens. Under recognized principles of international law, every country is entitled to treat citizens of other countries who are physically within its jurisdiction exactly the way it treats its own citizens.

Mr. Zakharov is almost certainly a Soviet spy. But under American law, which governs his case, not only must he be presumed innocent, but he may legally be not guilty. Mr. Zakharov has many defenses available to him that would not be available to Mr. Daniloff. If he was illegally entrapped or illegally searched, his

case may have to be thrown out. The prosecution may have difficulty overcoming the heavy burden of proving beyond a reasonable doubt that he had the requisite criminal intentions, or that he engaged in the narrow range of conduct specifically prohibited under our statutes.

While these issues are being decided, Mr. Zakharov may well be entitled to be free on bail. American bail law recently underwent considerable revision, making it easier to confine defendants before trial, and there are special considerations applicable to foreigners. But our Bill of Rights does provide that "excessive bail shall not be required," and it does not limit that right to American citizens. In any case, since Mr. Zakharov is now in the custody of the Soviet delegate to the United Nations, he is effectively out on bail. Some might argue that it is disturbing that it took a Soviet setup of an American to force us to comply with our own Constitution in this case.

It may be difficult for Americans to accept the ironic conclusion that flows from our presumption of freedom and the Soviet presumption of regulation: namely, that the Soviets are legally entitled to be far less fair to our citizens than we are entitled to be to theirs. That may not sound just, and indeed it is not. But would we really have it any other way?

Surely, we do not want to descend to their level of domestic tyranny, even in the way we treat citizens of other countries. Nor can we realistically expect the Soviet legal system — one of the most repressive in the world — to rise to our level, even in the treatment of our citizens. All we can realistically demand is that the Soviets not sink below the minimal level of human rights compliance expected of every civilized society.

The tragedy is that the Soviet legal system flunks even that not-very-demanding test, both in regard to its own citizens and in regard to Nicholas Daniloff.